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BRADLEY D. MORGAN, )  
 )  
 Appellant-Petitioner, )  
 )  
 vs. ) No. 34A02-0801-PC-19  
 )  
 STATE OF INDIANA, )  
 )  
 Appellee-Respondent. )

**June 3, 2008**

**BAKER, Chief Judge**

Appellant-petitioner Bradley D. Morgan appeals the denial of his petition for post-conviction relief, claiming ineffective assistance of appellate counsel. Specifically, Morgan claims that he was entitled to relief because his counsel on direct appeal failed to challenge the propriety of a flight instruction given to the jury and failed to argue that the trial court abused its discretion in sending an exhibit to the jury after deliberations had begun.

Morgan also argues that his sentence must be set aside because the trial court's enhancement of his sentence beyond the statutory presumptive term was based on aggravating circumstance that were not found by a jury, thus violating the rule announced in Blakely v. Washington, 542 U.S. 296 (2004). Finding no reversible error, we affirm the judgment of the post-conviction court.

### FACTS

On January 17, 1999, Morgan and several others attended a birthday party at the Kokomo National Guard Armory (the Armory). At some point, Morgan saw Billy Wiley and the two engaged in a shoving match. Thereafter, Morgan put his finger in Wiley's face, said "I'm going to get you for this," and left the room. Tr. p. 817.

Approximately twenty minutes later, Morgan returned with a handgun and approached Wiley. Wiley grabbed Morgan and tried to hold his arms down. Anthony Jones attempted to step between Morgan and Wiley, but Morgan fired a shot at Wiley. Morgan then fired two more shots in rapid succession, and he and Wiley fell to the floor. Wiley subsequently died from a gunshot wound to his head. Morgan sustained a self-inflicted gunshot wound to the hand.

After the shooting, Morgan left the Armory and started to drive away. However, Morgan lost control of his vehicle and crashed his vehicle into a snow bank. Morgan then ran over to Chandra Peltier's vehicle, which was stopped nearby, and opened the back door of her car when she started to drive away. Morgan tossed the gun into the snow and entered Peltier's backseat. Peltier then offered to drive Morgan to the hospital, but he refused and directed her to his mother's house.

Morgan entered his mother's house, yelling that he had been shot and needed to go to the hospital. Morgan ran to a neighbor's house and knocked on the door. Morgan asked Anthony White, Kishum Tyler, and Tymon Whitfield to drive him to his grandmother's house. White and Tyler saw that Morgan was bleeding, and Morgan told them that he had shot and killed Wiley. Whitfield told Morgan that he would give him a ride, but as he was putting on his shoes, Morgan's mother came out of her house. Thereafter, Morgan's mother drove him to the hospital.

When Morgan and his mother arrived at St. Vincent Hospital in Indianapolis, Morgan told the hospital personnel that he had fallen on some glass, but bullet fragments were found in his hand. Someone at the hospital contacted the police, and Marion County Sheriff's Deputy David Luker went to the hospital to complete a report. Morgan told Deputy Luker that one of his friends had accidentally shot him at an Indianapolis apartment complex.

Morgan was charged with murder on January 20, 1999. At trial, the handgun used in the murder was entered into evidence. A firearms expert testified that the handgun used in the shooting was a revolver and that the "trigger pull necessary to draw back the

hammer and then to release it to fire a shot without the gun being cocked was substantial.” Appellant’s App. p. 70. However, Morgan contended that he struck Wiley with his hand, “not realizing that he had the gun in his hand.” Id. at 71. Morgan also testified that as he and Wiley were struggling, the gun accidentally discharged.

When the handgun was published to the jury with some other evidence, the trial court instructed the jurors over Morgan’s objection:

You may, should you wish, although you’re not required to actually take this weapon from its box, touch it, look at it, even if you wish actually try to activate the trigger device. Of course, there’s no bullets in the weapon. It’s safe for you to do so. Again, you’re not required to but if in the course of your examination of this piece of evidence if you wish to do that, you may.

Tr. p. 1260. After the handgun was passed to the jury, the trial court noted for the record that none of the jurors attempted to pull the trigger.

Following the presentation of the evidence, the State offered a final instruction that read:

The flight of a person immediately after the commission of a crime and the evidence of actions calculated to hide a crime though not proof of guilt, are evidence of consciousness of guilt and are circumstances which may be considered by you in connection with all the other evidence.

Id. at 107. Defense counsel objected to the instruction, arguing that there was insufficient evidence to support the conclusion that Morgan fled. The trial court determined that the evidence in the record supported giving the instruction, it was not duplicative of other instructions, and it was a correct statement of the law. Thus, the trial court gave the instruction over Morgan’s objection. After deliberations began, the jury sent a note to the

trial court requesting a second examination of the gun. Defense counsel objected and argued that

I would object to the court allowing the Jury to take the single exhibit into the jury Room. My primary concern, Your Honor, is that it would allow the Jury to conduct experiments perhaps, whatever they want to do, uncontrolled experiments unmonitored by the Court where we have no ability to understand what it is that they're doing with that gun and what kind of experiment they'd be conducting.

Id. at 1464. The trial court overruled the objection and allowed the gun into the jury room for approximately thirty minutes.

The jury found Morgan guilty of murder, and on February 24, 2000, the trial court conducted a sentencing hearing and found the following aggravating factors:

The defendant's prior criminal record is that the defendant has previously been convicted of seven (7) misdemeanor offenses, of which six (6) offenses involved the illegal use of alcoholic beverages or marijuana, and one (1) offense involved the illegal possession of a weapon. The court also considers that the defendant was found to be in non-compliance of court-ordered drug and alcohol treatment or programs on three (3) occasions, and a prior suspended sentence was revoked on one (1) occasion due to a violation of probation.

The court also considers as an aggravating circumstance that the defendant was on bond for charged felony offenses when the instant offense was committed. In the Court's judgment, the defendant's criminal history demonstrates an escalating pattern of noncompliance with society's laws and rules. The court finds that the defendant is in need of rehabilitative and correction[al] treatment best provided by commitment to a penal facility.

Id. at 172-73. As mitigating factors, the trial court found that Morgan was remorseful, that he had obtained his GED, and that he was supporting his family before the incident.

Id. at 173, 1502. The trial court then determined that the aggravating factors outweighed the mitigators and sentenced Morgan to sixty years of incarceration.

Thereafter, Morgan appealed to our Supreme Court. Morgan v. State, 755 N.E.2d 1070 (Ind. 2001). Steve Litz, Morgan's counsel on direct appeal, asserted that Morgan's trial counsel was ineffective, that the trial court erred in allowing a pathologist to provide expert testimony on ballistics, and that the trial court erred in instructing the jury on the issue of intent. Id. at 1072. Morgan's conviction was affirmed in all respects. Id. at 1078.

On January 12, 2007, Morgan, by counsel, filed an amended petition for post-conviction relief.<sup>1</sup> Morgan alleged that his appellate counsel was ineffective because the flight instruction that the trial court gave was not challenged and his counsel failed to argue that permitting the handgun into the jury room during deliberations was an abuse of the trial court's discretion. Thereafter, Morgan filed a supplement to his petition for post-conviction relief, claiming that his sentence violated the rule in Blakely because the enhancement of his sentence was based on aggravating factors that were not found beyond a reasonable doubt by the jury.

During the post-conviction hearing that was conducted on June 28, 2007, the affidavits of five jurors were admitted into evidence. In essence, the jurors averred that they had experimented with the gun in the jury room by pulling the trigger. They also compared the weight of the gun to the weight of a cell phone, and at least one juror determined that the incident "could not have been an accident." Ex. 9. Litz submitted an affidavit averring that he no longer had a file and had no independent recollection of the

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<sup>1</sup> Morgan initially filed a pro se petition for post-conviction relief on September 12, 2002. Appellant's App. p. 5.

case. Following the hearing, the post-conviction court denied Morgan's request for relief and entered findings of fact and conclusions of law. In part, the post-conviction court determined:

#### CONCLUSIONS OF LAW

8. In his amended Petition, Morgan claims that he was denied effective assistance of appellate counsel by counsel's failure to raise the issue of the flight instruction . . . tendered by the State and given over trial counsel's objection.
9. The giving of this instruction over objection was held to be reversible error by the Indiana Supreme Court in Dill v. State, 741 N.E.2d 1230 (Ind. 2001). The Indiana Supreme Court issued its decision in Dill on February 7, 2001, after the appellate briefs in Morgan's direct appeal had been filed, but before the Indiana Supreme court had issued its decision denying Morgan's appeal.

. . .

11. Unlike the Dill case, the case against Morgan at trial was not largely circumstantial. At trial, Morgan admitted under oath that he had shot Wiley, and numerous witnesses testified to having seen Morgan shoot Wiley. The ballistic evidence showed that Morgan's gun was the murder weapon. The testimony of the forensic pathologist was that the gun's muzzle was pressed against the side of Wiley's head when Morgan discharged the gun, killing Wiley. This court can say with complete confidence, that the jury would have rendered a guilty verdict at the conclusion of Morgan's trial had the flight instruction not been given.
12. As noted above, the Indiana Supreme court did not issue its Dill decision until after the briefing in Morgan's direct appeal had been completed. Appellate counsel could have reasonably concluded that in light of all the evidence against Morgan, the issue of the flight instruction would not have made a difference in the result of Morgan's trial or on appeal. In determining whether appellate counsel's performance was deficient, the Indiana Supreme Court has cautioned that "the reviewing court should be particularly sensitive to the need for separating the wheat from the chaff in appellate advocacy, and should not find deficient performance when counsel's choice of some issues

over others was reasonable in light of the facts of the case and the precedent available to counsel when that choice was made.” Bieghler, 690 N.E.2d at 194.

13. Morgan claims in this post-conviction proceeding that he was denied effective assistance of appellate counsel due to counsel’s failure to raise as error in direct appeal the issue of the jury’s examination of the murder weapon in the jury room after deliberations had begun over trial counsel’s objection.
14. The Indiana Court of Appeals has held that sending exhibits to the jury room is within the trial court’s discretion and that the same consideration in the exercise of that discretion apply where exhibits are sent to the jury room at the beginning of deliberations and to a jury’s request to review evidence after deliberations have begun.
- . . .
16. At trial, Morgan testified that when he came out of the restroom and approached Wiley, he was unaware that he had the gun in his hand. He also testified that he had accidentally discharged the weapon three (3) times, killing Wiley. Morgan’s own testimony raised the issue of whether the weight and size of the weapon, and the difficulty or ease of pulling the trigger, helped create a reasonable doubt of whether Morgan intentionally killed Wiley. There is no doubt that an examination of the weapon by the jurors after hearing Morgan’s testimony aided the jury in their proper consideration of the evidence. The juror affidavits offered by Morgan only show that certain jurors did handle the gun to determine its weight and the difficulty or ease of pulling the trigger. The juror affidavits do not show that the weapon was subjected to improper use. Morgan was not unduly prejudiced by submission of the gun to the jury during its deliberations.
17. Appellate counsel could have reasonably concluded that in light of these considerations, the issue of the trial court granting the juror’s request to examine the weapon for thirty (30) minutes was not an abuse of discretion, and would not have made a difference in the result of Morgan’s trial, or on direct appeal.

. . .

19. Morgan's direct appeal was final before the United States Supreme Court's decision in Blakely v. Washington, 542 U.S. 296 (2004), which requires that a jury rather than a judge make certain fact-findings for sentencing, and that those facts must be proven beyond a reasonable doubt.
20. In Smylie v. State, 823 N.E.2d 679 (2005), the Indiana Supreme Court stated that Blakely would be applied retroactively only to those cases on direct review at the time Blakely was announced [June 24, 2004]. Clearly, Blakely does not apply retroactively to Morgan's case, whose direct appeal was concluded by his conviction being affirmed by the Indiana Supreme Court on February 7, 2001.
21. Even if Blakely applied to Morgan's case, his sentence of sixty (60) years was not improper. The court sentenced Morgan to a sentence five (5) years greater than the presumptive term based upon his prior criminal history.
22. In sum, Morgan's appellate counsel was not ineffective on direct appeal.

Morgan now appeals.

## DISCUSSION AND DECISION

### I. Standard of Review

We initially observe that a petitioner who has been denied post-conviction relief faces a "rigorous standard of review" on appeal. Dewitt v. State, 755 N.E.2d 167, 170 (Ind. 2001). The post-conviction court's denial of relief will be affirmed unless the petitioner shows that the evidence "leads unerringly and unmistakably to a decision opposite" that reached by the post-conviction court. Williams v. State, 706 N.E.2d 149, 154 (Ind. 1999). The petitioner has the burden of establishing the grounds for relief by a preponderance of the evidence. Id. A petitioner who has been denied post-conviction

relief is therefore in the position of appealing from a negative judgment. Collier v. State, 715 N.E.2d 940, 942 (Ind. Ct. App. 1999). Thus, we will not disturb the denial of relief unless “the evidence is without conflict and leads to but one conclusion, and the post-conviction court has reached the opposite conclusion.” Johnson v. State, 693 N.E.2d 941, 945 (Ind. 1998). We consider only the probative evidence and reasonable inferences therefrom that support the post-conviction court’s determination and will not reweigh the evidence. Bigler v. State, 732 N.E.2d 191, 194 (Ind. Ct. App. 2000).

## II. Morgan’s Claims

### A. Ineffective Assistance of Appellate Counsel

As set forth above, Morgan argues that his counsel on direct appeal was ineffective because he failed to argue that the flight instruction was error. Morgan also argues that he was entitled to post-conviction relief because his counsel failed to argue that the trial court abused its discretion in permitting the jurors to examine the gun in the jury room after deliberations had begun.

In addressing these claims, we initially observe that the standard of review for a claim of ineffective assistance of appellate counsel is the same as for trial counsel in that the defendant must show appellate counsel was deficient in his or her performance and that the deficiency resulted in prejudice. Reed v. State, 856 N.E.2d 1189, 1195 (Ind. 2006). There are three basic ways in which appellate counsel may be considered ineffective: 1) when counsel’s actions deny the defendant his right of appeal; 2) when counsel fails to raise issues that should have been raised on appeal; and 3) when counsel fails to present claims adequately and effectively such that the defendant is in essentially

the same position after appeal as he would be had counsel waived the issue. Grinstead v. State, 845 N.E.2d 1027, 1037 (Ind. 2006).

To prevail on a claim of ineffective assistance of appellate counsel, the petitioner must show both that (1) counsel's performance fell below an objective standard of reasonableness based on prevailing professional norms; and (2) there is a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different. Timberlake v. State, 753 N.E.2d 591, 603 (Ind. 2001). A reasonable probability is one "sufficient to undermine confidence in the outcome." Id. An inability to satisfy either prong of this test is fatal to an ineffective assistance claim. Id.

We also note that ineffective assistance of counsel is rarely found when the issue is the failure to raise a claim on direct appeal and is almost never found when the issue is the failure to present a raised issue adequately or effectively. Taylor v. State, 717 N.E.2d 90, 94 (Ind. 1999). The decision of what issue or issues to raise on appeal is one of the most important strategic decisions made by appellate counsel. Bieghler, 690 N.E.2d at 193. Thus, we give considerable deference to appellate counsel's strategic decisions and will not find deficient performance in appellate counsel's choice of some issues over others when the choice was reasonable in light of the facts of the case and the precedent available to counsel at the time the decision was made. Taylor, 717 N.E.2d at 94. To establish deficient performance for failing to raise an issue, the petitioner must show that the unraised issue was "clearly stronger" than the issues that were raised. Bieghler, 690 N.E.2d at 194. Even if counsel's choice of issues was not reasonable, a petitioner must demonstrate a reasonable probability that the outcome of the direct appeal would have

been different to prevail on post-conviction relief. Stevens v. State, 770 N.E.2d 739, 760 (Ind. 2002).

With respect to Morgan's claim that his appellate counsel was ineffective for failing to challenge the flight instruction, we note that our Supreme Court in Dill condemned the exact instruction that the trial court gave in this case. 741 N.E.2d at 1230. More particularly, the Dill court held that it is erroneous to give a flight instruction that is confusing, unduly focuses on specific evidence, and is misleading. Id. at 1233. However, it was also determined that the instruction could constitute harmless error. More specifically, the Dill court observed that "errors in the giving or refusing of instructions are harmless where a conviction is clearly sustained by the evidence and the jury could not properly have found otherwise." Id.

As the post-conviction court observed in its order denying Morgan's request for relief, the decision in Dill was handed down on February 7, 2001, after briefing was concluded but before the decision in Morgan's direct appeal was issued. Moreover, in Bellmore v. State, 602 N.E.2d 111, 119 (Ind. 1992), the Supreme Court cautioned against giving the flight instruction, but it was not found to be error.

Even assuming—without deciding—that Morgan's appellate counsel should have challenged the instruction on direct appeal, any error was harmless because the evidence established that Morgan admitted shooting Wiley. Tr. p. 1325. Specifically, one of the witnesses testified that he heard Morgan threaten Wiley. Id. at 814-17. It was also established that Morgan brought a loaded handgun to the party and had it in his hand

when he confronted Wiley. Several witnesses saw Morgan shoot Wiley. Id. at 646-47, 669-70, 702, 750, 1197, 1324-25.

The forensic pathologist testified that the muzzle of the gun was pressed to Wiley's head when Morgan fired the pistol. Id. at 1005, 1035. Moreover, there was no evidence that Wiley was armed or made any gesture that would have placed Morgan in fear for his life. In other words, the evidence failed to show that the offense was an accident, that Morgan committed reckless homicide, or that he acted in self-defense. Therefore, any error in giving the instruction was harmless because of the abundance of evidence of establishing Morgan's guilt. As a result, Morgan's claim of ineffective assistance of appellate counsel on this issue fails.

As for Morgan's claim that his appellate counsel was ineffective for failing to argue that the trial court erred in permitting the jurors to inspect the gun after deliberations had begun, this court has determined that the trial court should consider the following when deciding whether to provide jurors with physical evidence: (1) whether the material will aid the jury in a proper consideration of the case; (2) whether any party will be unduly prejudiced by submission of the material; and (3) whether the material may be subjected to improper use by the jury. Stokes v. State, 801 N.E.2d 1263, 1269 (Ind. Ct. App. 2003). Trial courts are permitted to be reasonably liberal in allowing the jury to rehear portions of the evidence. Id. However, the trial court's discretion is somewhat limited in situations where the jury interrupts its deliberations to request material to review. Id. If error results, it may only be harmless. See id. at 1270 (holding

that it was harmless error for the trial court not to monitor the use of a videotape when it was played for the jury in open court).

Here, Morgan's appellate counsel could have argued that the trial court abused its discretion in sending the gun back to the jury room after deliberations had begun, but no evidence could have been presented establishing that the gun was used inappropriately. Indeed, any claim on direct appeal that the jury experimented with the gun in an inappropriate fashion would have been merely speculative. Hence, we cannot say that Morgan's counsel's decision not to raise the issue was unreasonable.

Notwithstanding our observation that no evidence of juror misconduct was available to appellate counsel, we further note that although Morgan asserts juror misconduct at the post-conviction level, a defendant seeking a new trial because of juror misconduct must show that the misconduct was gross and that it probably harmed the defendant. Griffin v. State, 754 N.E.2d 899, 901 (Ind. 2001). We review the trial judge's determination on these points only for an abuse of discretion, with the burden on the appellant to show that the misconduct satisfies the requirements for a new trial. Id.

The Indiana Evidence Rules embody the longstanding common law principle that a verdict may not be impeached by evidence from the jurors who returned it. Johnson v. State, 700 N.E.2d 480, 481 (Ind. Ct. App. 1998). The rule against the impeachment of jury verdicts exists to avoid harassment of jurors, protect the privacy of their deliberations, and promote the finality of verdicts:

If this court were to permit individual jurors to make affidavits or give testimony disclosing the manner of deliberation in the jury room and their version of the reasons for rendering a particular verdict, there would be no

reasonable end to litigation. Jurors would be harassed by both sides of litigation and find themselves in a contest of affidavits and counter-affidavits and arguments and rearguments as to why and how a certain verdict was reached. Such an unsettled state of affairs would be a disservice to the parties litigant and an unconscionable burden upon citizens who serve on juries.

Stinson v. State, 313 N.E.2d 699, 704 (Ind. 1974).

We acknowledge that an exception to the juror impeachment rule exists when jury members are exposed to extrinsic influence or information during deliberations and there exists a substantial possibility that the extrinsic material prejudiced the verdict.<sup>2</sup> However, the defendant must demonstrate that the matters are extrinsic. And once the defendant carries that burden, the State must demonstrate that the matter is harmless. Stephenson v. State, 742 N.E.2d 463, 477 (Ind. 2003).

In determining what constitutes extrinsic evidence, our Supreme Court has held that “an experiment by the jury is improper where it amounts to additional evidence supplementary to that introduced during the trial.” Bradford v. State, 675 N.E.2d 296, 304 (Ind. 1996). However, situations where jurors have conducted experiments during deliberations with exhibits that had been admitted into evidence are internal matters. See Kennedy v. State, 578 N.E.2d 633, 640-41 (Ind. 1991) (holding that when the jurors tried on shirts that were admitted into evidence, there was no juror misconduct but rather a proper examination of the evidence).

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<sup>2</sup> In relevant part, Indiana Evidence Rule 606(b) provides that “A juror may testify (1) to drug or alcohol use by any juror, (2) on the question of whether extraneous prejudicial information was improperly brought to the jury’s attention or (3) whether any outside influence was improperly brought to bear upon any juror.”

In this case, Morgan specifically raised an issue regarding the size and weight of the gun when he claimed that he forgot that he had the weapon in his pocket, did not realize that he had it in his hand, and did not intentionally fire it. Tr. p. 1312-25, 1331, 1339-42, 1344-47. In response, the State elicited testimony as to the size and weight of the gun and the pressure required to pull the trigger at both the single and double action settings. Id. at 1050, 1053. The jurors then viewed the gun in open court and the trial court invited the jury members to pull the trigger, yet no one did. Id. at 1260-62. However, it is apparent that after hearing Morgan's testimony and the arguments of counsel, the jury desired to re-examine the gun. The juror affidavits that were submitted merely establish that the gun was handled to determine the weight, "feel," and difficulty or ease in pulling the trigger. Exhs. 5-9. In other words, the jurors evaluated and reviewed the handgun in light of the evidence and arguments that were presented at trial. As a result, no extrinsic evidence was placed before the jury and the jurors' actions did not go beyond the evidence that was presented at trial. The affidavits that Morgan presented to the post-conviction court related to an internal jury matter of reviewing the evidence that had been properly admitted. For all these reasons, Morgan's claim of ineffective assistance of appellate counsel fails.

#### B. Improper Sentencing

Morgan claims that he was improperly sentenced because the jury did not find the aggravating factors that the trial court used to enhance his sentence beyond the

presumptive term<sup>3</sup> of imprisonment in violation of the United States Supreme Court's pronouncement in Blakely. As a result, Morgan argues that his sentence must be set aside.

In resolving this issue, we note that the United States Supreme Court in Blakely announced the rule that a jury, rather than a judge, must make certain factual findings for sentencing, and that those facts must be proven beyond a reasonable doubt rather than by a preponderance of the evidence. Blakely, 542 U.S. at 303. However, a judge may enhance a sentence based upon the fact of a prior conviction without that fact being re-submitted to a jury. See Blakely, 124 S. Ct. at 2536; Hill v. State, 825 N.E.2d 432, 438 (Ind. Ct. App. 2005).

In this case, the record reflects that Morgan was sentenced in February 2000 under the former presumptive sentencing scheme. Morgan then pursued a direct appeal in August of 2000, and he did not challenge the propriety of the sentence. Notwithstanding Morgan's claim that the trial court improperly enhanced his sentence in violation of Blakely, our Supreme Court specifically held that the fundamental error doctrine is not available "to attempt retroactive application of Blakely through post-conviction relief." Smylie v. State, 823 N.E.2d 679, 689 n.16 (Ind. 2005); see also Walker v. State, 843

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<sup>3</sup> When Morgan was sentenced, the presumptive sentence for murder was fifty-five years. Ind. Code § 35-50-2-3. In 2005, the General Assembly amended this statute, removed the presumptive sentence, and substituted a range of forty-five (45) to sixty-five (65) years for the offense of murder. The advisory sentence for murder is fifty-five years. The felony sentencing statutes now provide that the person convicted is to be sentenced to a term within a range of years, with an "advisory sentence" somewhere between the minimum and the maximum term. See Ind. Code §§ 35-50-2-3 to -7.

N.E.2d 50, 58-59 n.3 (Ind. Ct. App. 2006) (observing that the petitioner was not able to raise a Blakely claim because his direct appeal was decided long before Blakely was decided), trans. denied. Because Morgan's appeal was final at the time Blakely was decided in 2004, Blakely does not apply.

The judgment of the post-conviction court is affirmed.

RILEY, J., and ROBB, J., concur.